IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 230 of 2007
IN
SPECIAL CIVIL APPLICATION No. 3242 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A. L. DAVE

HONOURABLE MR.JUSTICE S. D. DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJENDRA BABUBHAI VAKOTAR.
Versus
UNION OF INDIA & Another.

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Appearance :
Mr. TR MISHRA for the Appellant.
SERVED BY RPAD to Respondent No.1.
Mr. DARSHAN M PARIKH for Respondent 2.

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CORAM : HONOURABLE MR.JUSTICE A. L. DAVE

and

HONOURABLE MR. JUSTICE S. D. DAVE

Date : 03/12/2007

ORAL JUDGMENT : (Per : A. L. DAVE, J.)

1. The appellant challenges order passed in Special Civil Application No.3242 of 2005 on 20th June, 2005, dismissing the appellant's petition. In the petition, the challenge was to the decision of the Government not to refer the dispute raised by the present appellant to the Central Government Tribunal and, hence, this appeal.

2. The appellant raised a dispute in 2004, claiming that he was working with the respondent-Bank of Baroda, Rakhial Industrial Estate Branch, as a Peon in permanent capacity. He alleged that his services came to be terminated on 1.3.1996 without any reason and without following requisite procedure as contemplated under the Industrial Disputes Act and in violation of provisions contained in Sections 25F, 25G and 25N of the Bombay Industrial Relations Act (probably the appellant-petitioner refers to Industrial Disputes Act). The appellant had raised a dispute by issuing a notice of demand to the respondent, but since he was not reinstated, he filed a complaint before Assistant Commissioner of Labour (Central) on 20th January, 2004. The appellant-petitioner also tendered written submissions on 6.4.2004. He also filed an

application for condonation of delay. The said authority initiated conciliation proceedings which, ultimately, ended in a failure and the report was made by the authority on 8.6.2004 (Annexure "D" to the petition). The said report was sent to the Government of India, Ministry of Labour, which is the appropriate Government and the Government of India, by order dated 18.8.2004, refused to make reference on the ground of delay in raising the dispute (Annexure "E" to the petition). The appellant-petitioner, therefore, preferred petition under Article 226 of the Constitution and made following prayers :-

"(a) Your Lordships be pleased to issue a writ of mandamus or any other appropriate writ, order or direction and be pleased to quash and set aside the impugned order dated 18.08.2004 passed by the respondent refusing of make the reference of the Industrial Dispute raised by the petitioner.

(b) Your Lordships be pleased to issue the writ of mandamus or any other appropriate writ, order or direction and be pleased to direct the respondent to refer the Industrial Dispute raised by the petitioner to the competent Court.

(c) Your Lordships be pleased to direct the respondent to refer the Industrial Dispute raised by the petitioner to the competent Court pending admission, hearing and final disposal of the petition.

(d) Your Lordships be pleased to grant such other and further relief as may be deemed fit in the interest of justice."

3. Learned Single Judge, by the order impugned in this appeal, dismissed the petition relying on decision in the case of ***Nedungadi Bank Limited v. K. P. Madhavankutti & Ors., 2001(1) SLR 636*** and decision the case of ***Secretary, Indian Tea Association v. Ajit Kumar Barat & Ors., 2001(1) Scale 515.*** The learned Single Judge also observed that the order of the appropriate Government under Section 10 of the Act was an administrative order and not a judicial or quasi-judicial one and the scope of examination by the Court, therefore, would be restricted. It was also observed that no right of the petitioner was violated by such an administrative order. Ultimately, the learned Judge observed that when it was prima facie found by the appropriate Government that the petitioner prima facie failed to prove that he had completed 240 days in the last preceding year, i.e. in the year 1995, and also considering the fact that the dispute was raised after a period of eight years of the cause of action having arisen and when the appropriate Government had refused to refer the dispute or to make a reference to the Industrial Court or Labour Court, it could not be said that the order passed by the appropriate Government was illegal, perverse or contrary to law laid down by the Honourable Supreme Court or contrary to the statute. Aggrieved by the said order, present appeal is preferred.

4. Learned Advocate, Mr. T. R. Mishra, for the appellant submitted that in light of various judgments, the Government

cannot examine the question whether the workman has completed 240 days or not. Large number of disputed questions of fact may arise, which can be determined by the Tribunal on the basis of material that may be placed before it and the Government could not have founded its decision not to make reference on such a fact. Mr. Mishra submitted further that as per the settled proposition of law, delay in raising dispute cannot be a solitary ground for refusal to make reference or to reject the claim of the workman. He submitted that relief can appropriately be molded by refusing back wages or directing payment of only part of back wages. In support of his submissions, he has relied on decisions in the cases of ***Ajaib Singh v. The Sirhind Co-operative Marketing-cum-Processing Service Society Limited, 1999 Lab. I.C. 1435, Balaram Mishra v. Union of India & Others, 1998(79) FLR 154, Mysore Stoneware Pipes and Potteries Ltd. v. State of Karnataka, 1998(79) FLR 422, Natwarlal Amrutlal Shah v. Employees' State Insurance Scheme, 2001(4) LLN 1203, Karan Singh v. Executive Engineer, Haryana State Marketing Board, Manu/SC/3932/2007*** and an unreported decision of this Court [Coram: R. K. Abichandani & K. M. Mehta, JJ.(as they then were)] in ***Letters Patent Appeal No.1031 of 1996 dated 10.11.2003***.

5. On the other hand, learned Advocate, Mr. Parikh, submitted that the appellant raised the dispute after a long gap of eight years. The Government has a discretion whether to refer the dispute raised by the workman to the Tribunal or not. In the instant case, two factors have weighed with the Government, namely, that the workman has failed to prove that he worked for

more than 240 days in the last preceding year and that the dispute was raised at a belated stage. If there is no material to show that the workman has completed more than 240 days of work in the last preceding year, the Government would be justified in not referring the dispute for the reason that the entire exercise by the Tribunal would in futility. Mr. Parikh submitted that apart from that, delay is also an independent factor which has weighed with the Government. He submitted that the dispute is raised after a long time of about eight years and the respondent-bank does not have the record to support its version or to place contemporaneous material in support of the factual situation, which would prejudice the cause of the respondent-bank. Mr. Parikh submitted that when the learned Single Judge has considered all these aspects and has dismissed the petition, this Court may not exercise its appellate powers under Letters Patent and may dismiss the appeal.

6. We have taken into consideration rival side submissions. There is no dispute on the fact that the dispute was raised by the appellant-petitioner-workman after a lapse of about eight years. There is also no dispute about the fact that the appellant-workman did not produce any material to show that he had completed 240 days of work in the last preceding year when the question was under consideration by the Government whether to refer the dispute to the Tribunal or not.

6.1 It was vehemently contended by learned Advocate, Mr. Mishra, that the Government erred in relying on delay for not referring the dispute for the reason that the appellant had made an

application for condonation of delay before the Assistant Commissioner of Labour. However, there is no dispute that no order was passed by the Assistant Commissioner of Labour condoning the delay either below that application or while making a report of failure. It is also a fact on record that first a dispute was raised and, subsequently, after some time, the application for condonation of delay was preferred before the Assistant Commissioner of Labour.

7. In our view, therefore, making of an application for condonation of delay by the appellant before the Assistant Commissioner of Labour is of no virtue to the appellant for two reasons, the first being that no order was passed condoning the delay and the second being that the proceedings before the Assistant Commissioner of Labour were independent of the proceedings before the Government on the question whether to refer the dispute to the Tribunal or not.

8. The Government has considered two aspects, the first being that there was no material to show that the appellant had completed 240 days of work in the last preceding year and that the dispute was raised after a long lapse of eight years, for which no reasonable explanation is coming. The dispute being stale, it cannot be a subject matter of reference under Section 10 of the Industrial Disputes Act.

8.1 Again, here, in our view, the two grounds which have weighed with the Government are independent of each other.

Assuming that the question whether the workman had completed 240 days of work in the last preceding year could not have been examined by the Government while deciding the question of making reference, the delay part is a question which could have been independently examined and before the Government, no explanation was tendered for late raising of dispute.

9. Lapse of eight years is a long delay which may result into a total change of the complexion of the dispute and the structure of the employer-organization. In the instant case, it has come on record on affidavit that the respondent-bank is not supposed to and has not been able to find out the records after such a long time and non-availability of record will cause prejudice to the interest of the bank. The passage of time has changed the position of the bank. The bank has tried its level best to find out the records for the period from 1990 to 1996, but has not been able to find out the same despite sincere efforts. If a reference is made at a belated stage, the bank may not be able to produce any evidence contradicting the assertion of the appellant or in support of the stand of the bank, which would cause prejudice to the bank's interest.

9.1 With the above factual scenario, if the latest decision of the Apex Court in the case of ***Karan Singh v. Executive Engineer, Haryana State Marketing Board***, as relied upon by learned Advocate, Mr. Mishra, is considered, it has been observed that industrial Tribunal cannot strike down the reference on the ground of delay. The Tribunal has no authority to invalidate the reference

particularly when it found that the order of termination violated Section 25 of the Industrial Disputes Act.

9.2 We, however, notice that, in the instant case, the Government has refused to use its discretion by making a reference to the Tribunal unlike the situation in the case of *Karan Singh (supra)*. The Apex Court after considering several decisions, quoted the observations made by the Court in ***S. M. Nilajkar and Ors. v. Telecom District Manager, Karnataka, 2003(4) SCC 27***, where it was held thus :-

> *"...The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available..."*

In our view, when the respondent-bank has not been able to trace its records despite all its efforts, which could be made only when the dispute was raised after about eight years, no fault can be found with the bank nor could it be concluded that non-availability of records will not cause any prejudice to the bank's interest. The entire exercise after reference would be founded on verbal versions of both the sides. The workman asserting that he has completed more than 240 days of work in the last preceding year and the respondent-bank denying the same would be a situation of word against word, resulting in a chain of litigations in absence of undisputable facts. In our view, when the Government has declined to exercise powers and make reference in light of this delay in the fact-situation of the case and when the learned Single

Judge has also dismissed the petition considering relevant facts, we are of the view that no interference is called for in exercise of appellate powers under the Letters Patent. In our view, in the facts of the case, the delay itself is a good ground for not referring the dispute. It is independent of the other ground relied upon by the Government and, therefore, it is not material that the Government also relied on the ground of absence of evidence to show that the workman had worked for more than 240 days in the last preceding year and, therefore, the judgments relied upon by learned Advocate, Mishra , may not come to the rescue of the appellant. The appeal, therefore, must fail and stands dismissed. Notice is discharged. No costs.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

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